

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE MEALEY,

Defendant-Appellant.

UNPUBLISHED
February 16, 2012

No. 301658
Kalamazoo Circuit Court
LC No. 2010-000672-FH

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 6 to 25 years' imprisonment. We affirm.

On appeal defendant first raises several claims of prosecutorial misconduct, all of which are unpreserved and reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Review of prosecutorial misconduct generally involves an evaluation of the prosecutor's remarks as a whole, and in context, to determine whether the defendant received a fair and impartial trial. *Id.* at 330; *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Defendant first argues the prosecutor denied him a fair trial by impermissibly introducing inflammatory evidence relating to the dangers of methamphetamine laboratories and the severity of the methamphetamine problem in Michigan. We find his argument to be without merit.

During opening statement, the prosecutor sought to establish defendant's intent to produce methamphetamine, and he stated as much to the jury. He referenced the dangerous nature of methamphetamine. Although there was not an active laboratory in the case, the evidence presented actually established the grave dangers presented by the manufacturing materials recovered in the home. We conclude that the prosecution's accurate recitation of what the evidence tended to show, in this case that defendant undertook the production of a dangerous drug, does not amount to the introduction of unfairly prejudicial evidence. The opening statement is an appropriate time for the prosecutor to state the facts he intends to prove during trial; the prosecutor may not state facts to the jury that are unsupported by the evidence. *People v Ericksen*, 288 Mich App 192, 199-200; 793 NW2d 120 (2010).

The prosecutor also made cursory references to the dangers of methamphetamine during opening statement. The record shows these were offered to explain why Officer May called for a specialist to come to the crime scene. These statements, later borne out in Officer May's testimony, functioned to set the stage for Officer Clark's involvement and subsequent testimony. *Id.* Likewise, we conclude that references to the dangers of methamphetamine offered by the prosecution, and later confirmed in Officer Clark's testimony, were necessary to explain to the jury why physical evidence was not being admitted. There was no plain error in the prosecutor's opening statement. *Callon*, 256 Mich App at 329. Moreover, any potential undue prejudice resulting from the prosecutor's opening statement was cured by the trial court's instruction to the jury that the lawyer's statements and arguments were not evidence. *People v Unger*, 278 Mich App 210, 235, 237; 749 NW2d 272 (2008).

Turning to testimony offered by Officers May and Clark regarding the dangerous nature of methamphetamine, we conclude the evidence admitted was relevant and not unfairly prejudicial. Thus, there was no plain prosecutorial error. Relevant evidence is that which has any tendency to make a fact of consequence more or less likely. *People v Schaw*, 288 Mich App 231, 236-237; 791 NW2d 743 (2010). A prosecutor may offer all relevant evidence, not otherwise excluded, to prove his case, and a plea of not guilty places all elements of a criminal offense at issue. *People v Mills*, 450 Mich 61, 70-71; 537 NW2d 909 (1995). Merely being prejudicial does not render relevant evidence inadmissible; only unfairly prejudicial evidence should be excluded. *Id.* at 75. Moreover, prosecutorial misconduct cannot be premised on the prosecutor's good faith introduction of relevant admissible evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Here, evidence offered by Officers Clark and May relating to the dangers of methamphetamine was offered to explain their qualifications to investigate methamphetamine crimes, and the methods of investigating when methamphetamine is involved. Their testimony relating to the use of the items recovered for the production of methamphetamine was significantly more probative because of the specialized training received by Officer Clark, and the general training received by Officer May. Additionally, as in the prosecutor's opening statement, references in testimony that a specialist was called in because of the danger served merely to explain Officer Clark's involvement and set the stage for what he uncovered in his investigation. Likewise, the explanation of the need to destroy the items recovered because of the danger they posed, was reasonably offered to explain to the jury why they were viewing photographs instead of the physical items.

We also find the prosecution did not make an impermissible civic duty argument. A civic duty argument is one that improperly appeals to the fears and prejudices of jurors, and injects issues broader than a defendant's guilt or innocence. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). Here, the record contains no suggestion that the prosecutor attempted to ask the jury to convict based upon a civic duty. The severity of the drug problem was mentioned by a witness and was not mentioned in an argument by the prosecution at any point during the trial. No plain prosecutorial error has been shown. *Callon*, 256 Mich App at 329.

Defendant next argues error related to the admission of four hearsay statements. In each instance we find defendant's claim of prosecutorial misconduct, and underlying claim of evidentiary error, to be without merit.

First, Officer May's testimony that he was told a subject named Bob had been arrested was met with an objection, and the objection was sustained by the court. Because the objection was sustained on hearsay grounds, no evidentiary error exists. The court also offered an instruction to the jury to disregard the statement, thereby curing any harm. *Unger*, 278 Mich App at 235, 237. Further, from the record, the prosecutor's question that elicited the response was nothing more than a good faith effort to elicit information regarding the investigation, *Noble*, 238 Mich App at 660-661; the prosecutor did not ask the witness to recount anything anyone said to him. There was no prosecutorial misconduct.

Second, the prosecutor questioned Officer Clark about a third party's statement as to who owned recovered duffel bags. The question was designed to establish the reason for subsequent police conduct. Statements offered to establish the reason for police conduct are not hearsay. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). In good faith, the prosecutor sought to establish what statement led Officer Clark to interview defendant. When the statement was met with objection by defense counsel, the court ruled the statement inadmissible under MRE 403 because it presented a danger of confusing the issues. However, the prosecutor is allowed to make a good faith effort to introduce evidence, and no prosecutorial misconduct was established simply because the court determined the evidence inadmissible. *Noble*, 238 Mich App at 660-661. Additionally, the trial court ruled for defendant on the hearsay objection, and thus, there was no evidentiary error. While we believe the trial court should have stricken the statement from the record, in light of defendant's ownership of the red duffel bag and his admission that he was there to "manufacture," defendant cannot show that it was more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Third, the defense asserts that Officer Clark's testimony that a witness told him "Bob" owned the orange bag was impermissible hearsay elicited by the prosecutor. However, the statement was made during defense counsel's cross examination of Officer Clark and as such cannot constitute elicitation of hearsay by the prosecution. In terms of an evidentiary claim, the defense did not object to the statement and the claim is therefore unpreserved. Although the elicited statement is hearsay, MRE 801(c), and its admission is plain error, in light of the overwhelming evidence supporting defendant's conviction, he cannot show the statement affected the outcome of his trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Fourth, Officer May's testimony that a witness told him the laboratory was not hers, was not hearsay because it was offered to establish the reason for Officer May's subsequent conduct. *Chambers*, 277 Mich App at 11; MCR 801(c). The trial court provided a clear limiting instruction for the use of the testimony. As such, there was no prosecutorial misconduct in asking about the statement, and no abuse of discretion error in admitting the statement. *Lukity*, 460 Mich at 488.

In relation to the contested hearsay statements, defendant also argues on appeal that he was denied his constitutional right to confront witnesses against him. Because he failed to object to any of the statements on Confrontation Clause grounds, his argument is unpreserved. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003) (noting hearsay objections do not preserve a Confrontation Clause argument). Accordingly, we review for plain error. *People v Pipes*, 475

Mich 267, 274; 715 NW2d 290 (2006). Two of the hearsay objections were sustained in defendant's favor, and the statements ruled inadmissible. With regard to the admitted statements, in light of defendant's admitted ownership of the red duffel bag containing items for the production of methamphetamine, and his admission that he was there to "manufacture," admission of the contested statements was not outcome determinative and there is no error warranting reversal. *Carines*, 460 Mich at 763-764.

Next, defendant alleges his trial counsel's failure to object to any of the above instances of prosecutorial misconduct or hearsay statements deprived him of the effective assistance of counsel. Defendant raises the issue of ineffective assistance of counsel for the first time on appeal. Accordingly, his claim is unpreserved and review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, defendant must show: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant's claims of prosecutorial misconduct based upon the introduction of information relating to the dangers of methamphetamine are without merit. Because defense counsel is not ineffective for failing to offer a futile objection, trial counsel was not ineffective for not objecting. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989).

With regard to the hearsay statements, defense counsel successfully objected to Officer May's testimony that he was told a subject named Bob had been arrested and Officer Clark's testimony that a witness told him Bob owned the duffel bags. His timely and successful objections do not demonstrate the ineffective assistance of counsel. Although defense counsel did not move to have Officer Clark's testimony stricken, he may have simply wished to avoid dwelling on the issue—a potentially sound trial strategy. In any event, based on the facts, including defendant's ownership of the red bag and his presence at the home to "manufacture," any error by counsel did not create a reasonable probability of a different outcome. *Strickland*, 466 US at 668, 694. Defense counsel also offered a timely and well-reasoned objection to Officer May's testimony that a witness denied her ownership of the laboratory. Although the trial court admitted the evidence, defense counsel is not deemed ineffective simply because his strategy did not prevail. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). His conduct was not objectively unreasonable. *Strickland*, 466 US at 694. Finally, as explained above, Officer Clark's testimony that a witness told him Bob owned the orange bag emerged in the course of defense counsel's cross-examination. Although the defense may have faltered in inviting this testimony, the error was quickly countered by a question, and witness answer, confirming that defendant stated "John" owned the orange duffel. And, as stated above, in light of the overwhelming evidence supporting defendant's guilt, any error by defense counsel did not create a reasonable probability of a different outcome. *Strickland*, 466 US at 668, 694.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause